

**THIRD AMENDMENT TO
DEVELOPMENT AGREEMENT REGARDING
DEVELOPMENT OF THE EAST BANK**

This Third Amendment to Development Agreement Regarding Development of the East Bank (“Agreement”), is made and entered into at Wichita, Kansas, as of the _____ day of June, 2006, by and between the City of Wichita, Kansas, a Kansas Municipality (“City”), and WaterWalk LLC, a Kansas limited liability company (“Developer”).

WHEREAS, Developer and City have executed a Development Agreement Regarding Development of the East Bank, dated September 10, 2002, as amended by that certain Amendment to Development Agreement Regarding Development of the East Bank dated December 2, 2003, and that certain Second Amendment to Development Agreement Regarding Development of the East Bank dated October 12, 2004 (collectively the “Development Agreement”); and,

WHEREAS, subsequent to October 12, 2004, the concept of the development has changed in significant respects, including the elimination of the originally contemplated waterway and certain features of the Destination Retailer Improvements, revision of the Master Plan, and a shift to construction without public bidding on several additional structures in the development; and,

WHEREAS, the parties desire to further amend the Development Agreement to account for the intended revisions in the development and to authorize the construction of specific structures without public bidding, pursuant to the requirements of Charter Ordinance No. 177 of the City of Wichita, Kansas;

NOW, THEREFORE, the parties agree to amend the Development Agreement as follows:

1. The third and fourth sentences of the “Summary” section on the first page of the September 10, 2002 agreement is deleted and replaced with: “The public component will have water features and one or more performance venues, public art, landscaping, green spaces and other public areas.”

2. In Section 1.1, the following defined terms are added or revised:

“Amphitheater Improvements Site” shall mean that area indicated for construction of an Amphitheater with Basement on Attachment B hereto.

“Amphitheater Improvements” shall mean the amphitheater, underlying basement and associated water features to be constructed by the Developer with funds allocated from the public improvements portion of the Development Budget, in the amount of \$3,500,000, or such greater amount as the governing body of the City shall subsequently approve.

“Building C Parking Structure Improvements Site” shall mean that area indicated for construction of the Building C Parking Structure on Attachment A hereto.

“Building C Parking Structure Improvements” shall mean the parking structure to be constructed by the Developer within the Building C Parking Structure Improvements Site, utilizing a \$6,910,000 City economic development contribution reallocated from the public improvements portion of the Development Budget and Developer funds as necessary to pay any costs exceeding such amount, and as to which parking structure the Lease form for Building C will be modified to provide:

- a) that the Tenant shall pay all taxes thereon, and shall maintain the parking structure and not demolish or destroy the same without replacement until City funding for the Building C parking structure is fully amortized;
- b) that the parking structure, like the Tenant Improvements, will be owned by the Tenant during the term of the Lease, but will revert to the City thereafter;
- c) that a minimum of 250 spaces in such parking structure will be available for public parking each day from 6:00 a.m. to 6:00 p.m., local time, and a minimum of 350 spaces in such parking structure will be available for public parking each day after 6:00 p.m. local time;
- d) that the City and its agents shall have the right to enter upon and inspect the parking structure, and in the event the same is found to have become dangerous and unsafe, the City may take action to require the Tenant to repair, or to itself enter and repair the parking structure, assessing the cost of such repairs against the property as provided under K.S.A. 12-1752, *et seq.*, and City ordinances pertaining to the repair of dangerous and unsafe structures.

“Destination Retailer Improvements” is revised to mean all improvements associated with the development of a destination retail store located within the Destination Retailer Improvements Site (as shown on Exhibit 15), except for the streets and underlying utility infrastructure located within such area. Such improvements shall include the adjacent parking facilities located within the Destination Retailer Improvements Site, but shall not include any pedestrian bridge. For purposes of this definition, street segments located under a parking structure are considered Destination Retailer Improvements.

“Destination Restaurant Improvements” shall mean a restaurant to be constructed by the Developer within the area included in the Project Boundary shown on the Master Plan Revision reflected in Attachment C hereto, utilizing a \$1,000,000 City economic development contribution from the restaurant improvements portion of the Development Budget, together with Developer funds of not less than \$1,000,000 plus such additional Developer funds as may be necessary to pay any costs exceeding such amount. The selection of the initial operator of the Destination Restaurant Improvements shall be subject to the approval of the City Representative.

“General Contractor(s)” To be determined by the Developer for the private development, Destination Retailer Improvements, Destination Restaurant Improvements,

Building C Parking Structure Improvements and Amphitheater Improvements and to be determined by the City for the Public Improvements.

“Master Plan Revision” shall mean Attachment C hereto, modifying the Site Plan (Exhibit 2 to the Development Agreement).

“Parking Agreement” shall be revised to mean the WaterWalk Parking District Agreement separately approved by the parties, which is to become a replacement for original Exhibit 9 to the Development Agreement.

“Project Architect(s)” To be determined by the Developer for the private development, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements and to be determined by the City for the Public Improvements.

“Project Costs” means those costs, expenses, fees and other charges which relate to the Developer’s Private Improvements, the City’s Public Improvements, the Destination Retailer Improvements, the Destination Restaurant Improvements, the Building C Parking Structure Improvements and the Amphitheater Improvements hereunder and which are identified in the Development Budget.

“Property Manager(s)” To be determined by the Developer for the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, and Building C Parking Structure Improvements, and to be determined by the City for the Public Improvements and the Amphitheater Improvements.

3. In Section 2.1, the second sentence is amended to read, “Except for the Master Planning Phase, the Developer shall only be responsible for Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements, and for private structures and Private Improvements for Phase I as set forth herein.”

4. In Section 2.4, the first sentence is amended to read, “Notwithstanding the City’s participation in the Master Planning and Phase I of the East Bank Redevelopment project, the City’s commitment to any Public Improvements, Destination Retailer Improvements, Building C Parking Structure Improvements, Destination Restaurant Improvements and Amphitheater Improvements is limited to those improvements specifically listed in this Agreement (Phase I).”

5. Section 4.1(d) shall be amended to read, “Use good faith efforts to utilize competitive procurement for the delivery of all Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements.. Developer shall use good faith procedures to include minority owned businesses and women owned businesses. The Developer and General Contractor have undertaken to use such businesses for approximately \$3,000,000 of the work on the Destination Retailer

Improvements. All such agreements shall be in the name of the Developer or General Contractor and not the City.”

6. Section 4.4 is amended to read, “4.4 Cooperation. Developer and the City agree to develop a mutually-agreeable schedule for coordination of the Public Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Private Improvements. Developer and the City agree to work harmoniously, whenever possible, during construction of all such improvements.”

7. Several subsections of Section 5.1.2, relating to documents to be delivered at or before Construction Phase Closing, are amended, as follows:

Subsection (a) is amended to read, “(a) Construction permit and all other necessary permits for the construction of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements;”

Subsection (b) is amended to read, “(b) An executed loan commitment by the necessary parties to make the loan for the construction of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements for which a building permit has been issued;”

Subsection (d) is amended to read, “(d) A certification by the Developer that it has examined the land upon which the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements will be built and made all other investigations it deems reasonably necessary for the performance of its duties under this Agreement;”

Subsection (f) is amended to read, “(f) Executed copies of the construction contract and/or design-build contract between the Developer and the Contractor, and the contract between the Developer (or General Contractor) and the Developer’s (or General Contractor’s) Project Architect;”

Subsection (g) is amended to read, “(g) Such other documentation, including plans and specifications, schematic drawings and renderings of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements for which a building permit has been issued, as may reasonably be requested by the City Representative to insure the orderly development of the Project;” and,

Subsection (h) is amended to read, “(h) Executed copy of a ground lease in the form of Exhibit 6 for use of City owned real property to be used by the Developer to construct the Private Improvements, Destination Retailer Improvements, and Destination Restaurant Improvements for which a building permit has been issued; and in the case of Building C, an

executed copy of a ground lease in the form of Exhibit 6 but with the modifications required to conform to the definition of Building C Parking Structure Improvements in Section 1.1 of the Development Agreement, for the use of City owned real property to be used by the Developer to construct Building C and the Building C Parking Structure Improvements for which a building permit has been issued;”

8. In Section 5.2, Subsections (d) and (g) are amended as follows:

Subsection (d) is amended to read, “(d) The Developer shall have obtained all construction permits and other necessary permits and licenses for the construction of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements;” and,

Subsection (g) is amended to read, “(g) The funds necessary to construct the Destination Retailer Improvements, the Private Improvements, the Destination Restaurant Improvements, the Building C Parking Structure Improvements and the Amphitheater Improvements contemplated by the Development Budget shall be available to the Developer on terms and conditions satisfactory to the Developer, and the Developer shall have obtained and provided instruments of surety guaranteeing the full and faithful completion and construction of the Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements, in the full amount of the estimated cost of such improvements;”

9. In section 5.3, the second sentence is amended to read, “The City shall convey to the Developer the executed ground lease for the Destination Retailer Building Site, the Building C Parking Structure Improvements Site, the Amphitheater Improvements Site and the land upon which the Private Improvements and destination Restaurant Improvements for which a building permit has been issued will be built; and an executed Parking Agreement for Phase I in the form of Exhibit 9.”

10. Several subsections of Section 5.4 are amended, as follows:

Subsection (b) is amended to read, “(b) To be fully responsible for causing construction and under no circumstances require City to pay directly for any labor or material ordered or purchased by Developer, any Specialists and Contractors, or anyone else supplying labor or materials to the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, or Amphitheater Improvements;”

Subsection (d) is amended to read, “(d) To obtain all utility permits, certificates of occupancy, and all other licenses, permits, and easements required for the completion of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements for which a building permit has been issued;”

Subsection (g) is amended to read, “(g) Prepare and submit to the City Representative supplements and refinements to the Development Budget as development of the Private Improvements, Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements moves through its various phases to Final Completion;” and,

Subsection (k) is amended to read, “(k) All contracts with all Contractors shall warrant that the work performed or materials supplied by that Contractor for the Private Improvements will be free from any defects in materials and workmanship for a period of at least one (1) year from the date of final completion of each respective building, and that such one (1) year warranty does not restrict or otherwise limit that Contractor’s obligation to construct the Project in a workman like manner and in accordance with the Development Plan as it pertains to that Contractor’s work. All contracts with all Contractors shall warrant that the work performed or materials supplied by that Contractor for the Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Amphitheater Improvements will be free from any defects in materials and workmanship for a period of at least one (1) year from the date of final completion of such improvements, and that such one (1) year warranty does not restrict or otherwise limit that Contractor’s obligation to construct the Project in a workman like manner and in accordance with the Development Plan as it pertains to that Contractor’s work. Developer shall enforce all such warranties for the benefit of the City if so directed by the City Representative.”

11. The first clause of Section 6.1 is amended to read, “Upon completion of construction of the Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Phase I Private Improvements in accordance with this Agreement, Developer shall provide the City Representative with the following as to each such improvement:”

12. Subsections (d), (e) and (f) of Section 6.1 are amended as follows:

Subsection (d) is amended to read, “(d) A final accounting of all costs associated with the construction of Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Private Improvements in a format consistent with the categories and descriptions in the Development Budget;”

Subsection (e) is amended to read, “(e) An ‘as-built’ survey for the constructed Destination Retailer Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Private Improvements prepared by a registered surveyor approved by the City Representative;” and,

Subsection (f) is amended to read, “(f) ‘As-built’ plans for the constructed Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Destination Retailer Improvements (including all structures and underground facilities) prepared by the General Contractor.”

13. Section 9.1 is amended to read, “9.1 Third-Party Fees. Developer shall pay all fees, costs, and expenses of Specialists and Consultants and Contractors and anyone else supplying labor, equipment, material, supplies, or services of any kind to the Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Destination Retailer Improvements in accordance with the Development Plan and the Development Budget for such improvements.”

14. Section 9.3 is amended to read, “9.3 Compensation of the Project Architect. The compensation to be paid to the Project Architect for services rendered in connection with the Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Destination Retailer Improvements shall be paid pursuant to the terms, conditions and provisions of separate written agreements between the Developer or General Contractor and the Project Architect. The Developer or General Contractor will pay all fees for architectural and engineering services for the Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements and Destination Retailer Improvements in Phase I. If the City elects to utilize the Project Architect pursuant to the terms of Section 4.2, the City shall separately pay for architectural services for the Public Improvements and/or Amphitheater Improvements, pursuant to a contract between the City and the Project Architect.”

15. Section 9.4 is amended to read, “9.4 Compensation of the General Contractor. The compensation to be paid to the General Contractor for the services rendered in connection with the Private Improvements, Destination Restaurant Improvements, Building C Parking Structure Improvements, Amphitheater Improvements and Destination Retailer Improvements shall be paid pursuant to the terms, conditions and provisions of separate written agreements between the Developer and the Project General Contractor. The City will contract and pay separately for the Public Improvements in accordance with Section 2.1.”

16. In Section 14.8, the notice addresses of the City are amended to:

City Manager
City Hall, 13th Floor
455 N. Main Street
Wichita, KS 67202
Facsimile (316) 268-4519

Director of Finance
City Hall, 12th Floor
455 N. Main Street
Wichita, KS 67202
Facsimile (316) 268-4656

and

City Attorney
City Hall, 13th Floor
455 N. Main Street

Wichita, KS 67202
Facsimile (316) 268-4335

In addition, the first-listed notice address for the Developer is amended to:

WaterWalk, LLC
Jack P. DeBoer, Manager
Attn: Greg Kossover
8621 E. 21st Street
Wichita, KS 67220

17. Exhibit 1 shall be revised to delete the last sentence of the first paragraph and all of the second paragraph of I.A., Project Goals.

18. Exhibit 2 shall be supplemented by the Master Plan Revision which is Attachment C hereto.

19. The first paragraph of Exhibit 3 is modified to remove references to a pedestrian bridge.

20. Exhibit 4 is modified and updated to reflect and conform to the Project changes to date.

21. Exhibit 5 is modified in its Note 4 to remove the erroneous reference to a parking garage as part of the Private Improvements.

22. Exhibit 10 is modified and updated to reflect and conform to the project changes to date.

23. Revised Exhibits 1,3, 4, 5, 6 and 10 and Attachments A, B, and C as referenced hereinabove are attached to this amendment and incorporated into the Agreement by reference.

24. All provisions of and exhibits to the Agreement not specifically amended, revised or replaced hereby shall remain unchanged.

IN WITNESS WHEREOF, the parties have caused this Amendment to be signed by their duly authorized officers, as of the date first above written.

CITY:

THE CITY OF WICHITA, KANSAS

DEVELOPER:

WATERWALK, LLC

By: _____

By:_____

Carlos Mayans
Mayor

Jack P. DeBoer
Manager

Attest: _____
Karen Sublett
City Clerk

Approved as to Form:

Gary E. Rebenstorf
City Attorney

IN WITNESS WHEREOF, Developer and City have duly executed this Third Amendment on the date first above written.

CITY OF WICHITA, KANSAS

WATERWALK LLC

By _____
Carlos Mayans, Mayor

By _____
Tom Johnson, President

“City”

“Developer”

Attest:

_____, City Clerk

Approved As To Form:

Gary E. Rebenstorf, City Attorney